

SERVICE DATE – MARCH 22, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 734

DISPUTE RESOLUTION PROCEDURES UNDER THE FIXING AMERICA’S SURFACE
TRANSPORTATION ACT OF 2015

Decided: March 20, 2017

Digest:¹ The Board denies a request to reconsider its final rules implementing passenger rail-related dispute resolution provisions of the Fixing America’s Surface Transportation Act of 2015.

On December 19, 2016, the Capitol Corridor Joint Powers Authority (CCJPA) filed a petition for reconsideration of the Board’s final rules in this proceeding, issued on November 29, 2016 (Final Rule), and also requested that the Board commence a supplementary rulemaking. In the Final Rule, the Board promulgated procedural rules to address requests from parties in disputes involving the State-Supported Route Committee and the Northeast Corridor Commission for assistance in securing professional mediation services pursuant to the Fixing America’s Surface Transportation Act of 2015, Pub. L. No. 114-94 (signed Dec. 4, 2015) (FAST Act). The FAST Act directed the Board to establish procedures for the resolution of certain disputes, that “may include the provision of professional mediation services.” 49 U.S.C. § 24712(c)(2) & 24905(c)(4).

The Final Rule decision noted that while formal disputes under the FAST Act (i.e., under 49 U.S.C. §§ 24712 and 24905) would be conducted using the Board’s existing Rules of Practice as a guide, the potential to offer “professional mediation services” is unique to the authority granted under the FAST Act, and the Rules of Practice contain no applicable provisions. Therefore, the Board fulfilled the FAST Act’s requirements by (a) referring certain parties involved in passenger rail disputes to the existing Rules of Practice and (b) adopting a new 49 C.F.R. § 1109.5, which allows such parties to informally request the Board’s assistance in securing outside professional mediation services.

CCJPA’s petition claims that the Board failed to implement properly the dispute resolution provisions of 49 U.S.C. § 24712 and did not address the concerns of CCJPA or the California Department of Transportation, Los Angeles-San Diego-San Luis Obispo Rail Corridor

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Agency, and San Joaquin Joint Powers Authority (collectively, California Entities).² Specifically, CCJPA asserts that the Board did not satisfy Congress' requirements under 49 U.S.C. § 24712(c) that the Board "establish procedures for resolution of disputes brought before it" and that the decisions of the Board "shall be binding." (Pet. 2.) CCJPA also suggests that Congress intended for the Board to develop "a streamlined dispute resolution process," which the Board failed to do. (Pet. 7.)

The Board did not receive any other filings in response to the Final Rule, nor did the Board receive any responses to CCJPA's petition.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1110.10, any person may timely petition for reconsideration of the Board's decision in a rulemaking proceeding. The petitioner should identify its interests, the specific action it seeks, and the arguments favoring that action. 49 C.F.R. § 1110.10. Here, CCJPA timely filed its petition and addressed the requirements of the regulations. However, the Board finds that CCJPA has not shown that the Final Rule fails to satisfy the requirements of the FAST Act or that any other action should be taken by the Board.

CCJPA's primary contention is that the Board has failed to establish procedures under which the Board would conduct binding dispute resolution with respect to disputes involving the State-Supported Route Committee.³ Pointing to the statute's references to "the Surface Transportation Board" and disputes "brought before it," and the provision that a decision "of the [] Board" "shall be binding," CCJPA argues that the Final Rule fails to provide for such binding dispute resolution by the Board. (Pet. 2-4.) The Board, however, is in full compliance with the statutory obligations created by 49 U.S.C. § 24712(c). As the Board noted in issuing the Final Rule, "parties may bring contested matters under §§ 11204 or 11305 of the FAST Act before the

² The California Entities each submitted comments in response to the Board's notice of proposed rulemaking. See Dispute Resolution Procedures Under the Fixing America's Surface Transp. Act of 2015, EP 734 (STB served July 28, 2016).

³ The relevant FAST Act provision, now codified at 49 U.S.C. § 24712(c), provides:

- (1) REQUEST FOR DISPUTE RESOLUTION.—If a dispute arises with respect to the rules and procedures implemented under subsection (a)(4), an invoice or report provided under subsection (b), implementation or compliance with the cost allocation methodology developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 . . . or amended under subsection (a)(6) of this section, either Amtrak or the State may request that the Surface Transportation Board conduct dispute resolution under this subsection.
- (2) PROCEDURES.—The Surface Transportation Board shall establish procedures for resolution of disputes brought before it under this subsection, which may include provision of professional mediation services.
- (3) BINDING EFFECT.—A decision of the Surface Transportation Board under this subsection shall be binding on the parties to the dispute.

Board, guided by the Board’s existing Rules of Practice.” (Final Rule, slip op. at 5.) By referring parties to its existing complaint procedures, the Board satisfied the FAST Act’s requirement to “establish procedures for resolution of disputes” brought before it. The adjudication of a complaint brought under the Board’s existing Rules of Practice is a form of “dispute resolution” by the Board itself, and § 24712(c)(3) makes a Board decision on such a complaint “binding on the parties to the dispute.”⁴

The FAST Act does not require the Board to establish any particular *type* of binding dispute resolution process, nor does it prohibit the Board from concluding, as it did, that its existing Rules of Practice provide a satisfactory procedural framework for parties to seek binding resolution of a dispute under the FAST Act.⁵ The statute provides that the form of dispute resolution that the Board elects to establish “may include provision of professional mediation services.” 49 U.S.C. § 24712(c). That option was not already included in the Board’s rules, which is why the Board issued new rules relating to requests for professional mediation services in 49 C.F.R. § 1109.5.

The various objections CCJPA raises to the Board’s approach are without merit. CCJPA’s assertion that the FAST Act requires the Board to develop a new, “streamlined” dispute resolution process different from its established complaint procedures is not supported by the Act’s language or CCJPA’s arguments concerning the legislative history. (See Pet. 4-5, 7.) The FAST Act does not place any qualifier on the dispute resolution procedures to be employed. CCJPA relies on language from proposed legislation in an earlier Congress concerning “expedited resolution of disputes.” That language, however, was *omitted* from the enacted statute, which undermines CCJPA’s position rather than supporting it. (See Pet. 4-5 (citing H.R. Rep. No. 114-357, at 520, 522 (2015)).) Similarly, CCJPA’s argument that the Board is precluded from relying on its existing procedures, because “Congress knows how to instruct the Board to use existing procedures when that is its intent,” (Pet. 7), is unpersuasive. It is within the Board’s discretion to conclude that application of those existing rules is a permissible way for the Board to resolve FAST Act disputes. The Board did not “read the FAST Act as authorizing *only* professional mediation services,” (Id. at 6) nor did the Board suggest “that it lacks authority to establish rules for binding resolution” of FAST Act disputes, (Id. at 5). Rather, the Board recognized that the FAST Act requires procedures for the Board to resolve disputes and, as

⁴ CCJPA misreads the statute as imposing a “requirement” on the Board to take some distinct action to render its decision binding. (Pet. 4-5.) To the contrary, under the plain language of the statute, § 24712(c)(2) requires the Board to “establish procedures for resolution of disputes” and § 24712(c)(3) renders a Board decision pursuant to those procedures “binding on the parties.”

⁵ Indeed, the Board already has such a case (involving the Northeast Corridor Commission) before it. See Pet. of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048 (STB served Oct. 3, 2016). While that case is currently in abeyance, Amtrak availed itself of the Board’s existing Rules of Practice to file its complaint, and the Board anticipates that parties in future cases will be able to do the same.

discussed above, concluded that the agency's existing Rules of Practice provide a sufficient framework for parties to seek Board binding resolution of such disputes.⁶

By combining the Board's existing practices for conducting binding dispute resolution, where applicable and sufficient, with new rules at 49 C.F.R. § 1109.5 that establish a procedure for parties' requests for professional mediation services, the Board has fully satisfied the requirements of 49 U.S.C. § 24712(c). CCJPA has failed to establish grounds for reconsidering the Board's Final Rule, and there is no need to commence a supplementary rulemaking.

It is ordered:

1. CCJPA's petition for reconsideration is denied.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

⁶ CCJPA also argues that only disputes arising from the implementation of the cost allocation methodology under section 209 (and not disputes related to the State-Supported Route Committee's rules and procedures or invoices and reports) "appear capable of formal adjudication by the Board." (Pet. 7.) CCJPA provides no explanation for this conclusion, and the FAST Act itself provides no basis for concluding that a member of the State-Supported Route Committee could not rely on the Board's existing Rules of Practice to bring to the Board a complaint to resolve a dispute regarding the Committee's rules, procedures, invoices or reports.